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SEP 22 1996

CONCORD, N.H.

December 22, 1954

James J. Barry, Commissioner  
Public Welfare  
State House Annex  
Concord, New Hampshire

Re: Membership of employees of political  
sub-divisions in State Employees Retirement System.

Dear Sir:

You have inquired by your letter of December 17, 1954 as to my opinion whether employees of political sub-divisions whose positions are covered by the State Employees' Retirement System but who are not contributing into the system are members for the purpose of any referendum to be held pursuant to the 1954 amendment to the Federal Social Security Act. You state that for the purpose of a referendum the employee must occupy a position covered by a retirement system and be a member of such system.

You are hereby advised that it is my opinion that such employees are not members for such a purpose. c.201, s. 2, Laws of 1945 provides a political subdivision may "elect to have its officers and employees become eligible to participate in the state employees' retirement system." Section 4, as amended provides that membership in the system shall be optional for officers and employees who are in the service of the subdivisions "on the date when participation becomes effective." Said section further provides by paragraph II the "membership shall be compulsory for all employees entering the service of such employer after the date participation becomes effective."

One other section has language relevant to this problem, to wit, section 6 which provides that employees who have become members of the state employees' retirement system shall contribute at the same rates of contribution and on the same basis as state employees. This section further provides that employers whose employees become members of the system shall also make contributions.

In the case of employees entering the service of a subdivision after the date participation becomes effective membership in the

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system is compulsory and a condition of employment. There is no discretion or choice left to the employee, and thereupon contributions must be made by both the employee and employer. However, it is my opinion that until actual contributions are made and the employee becomes an active contributing member he is not a member of the system. Until that time he is an employee eligible for membership and one whom in accordance with the chapter must become a member and payroll deductions must be made by the employer with matching contributions to be made by it. But until such is done the employee is neither carried on the rolls of the system, as it has no knowledge of such an employee, nor is he entitled to any of the benefits. It would be a complete anomaly to say that a non-contributing, non-participating employee who is unknown to the system and entitled to none of its benefits, is nevertheless a member of the system so as to be able to participate in a referendum for OASI purposes.

Such an employee is nothing more than one eligible for membership and who is a non-member in violation of the clear provisions of c.201, Laws of 1945.

Very truly yours,

Richard C. Duncan  
Assistant Attorney General

RCD/G